No. 82-1735.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

ISAAC ROKOWSKY,
PETITIONER,

v.

ROBERT GORDON, LOLA JACOBSON AND
LOLA JACOBSON, AS EXECUTRIX OF THE ESTATE OF
MAURICE GORDON,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondents in Opposition.

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Questions Presented.

As the respondents set out more fully in the following statement of the case, the petitioner has misstated the facts in his formulation of the questions presented. The trial was not solely "breach of contract actions," but from its inception included fraud claims.

Also, petitioner attempts to create the impression that he intentionally withheld evidence in reliance on the court's denial of the motion to amend under Fed.R.Civ.P. 15(b) without prejudice. However, when given the opportunity on numerous occasions to demonstrate what additional evidence he would have adduced he utterly failed to do so. In fact, the district court found his assertions of prejudice to be insubstantial.

Finally, contrary to petitioner's claim that he objected to the assertion of the new issue at every opportunity, he injected the new issue, admitted his fradulent conduct, failed to object to evidence on the new issue and actively participated in direct and cross-examination on the new issue both before and after the motion to amend was first raised.

In these circumstances, there are simply no questions fairly presented for this Court's review. However, the issues which we address in this brief are:

1. Where a party opens and injects a new issue, not incidentally or as a collateral matter, directly and fully litigates it, and fails to demonstrate undue or material prejudice, the allowance of a Rule 15(b) motion is not an abuse of discretion.

2. Where these circumstances arise in the context of a jury-waived trial, petitioner is neither denied a right to trial by jury or deprived of his right to due process of law.

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Statement of the Case.

The Facts.

In early 1974, Rokowsky was negotiating a contract with the respondents to purchase twenty-eight office buildings in downtown Boston, owned or controlled by respondents herein, for a price of $42 million, to be comprised of $6 million to be paid in cash, by assumption of an existing $20 million mort-

gage and a $16 million purchase money mortgage to be taken back by the respondents (A. 3a). Because the respondents objected to taking back a purchase money mortgage, the price was reduced to $38 million, to be comprised of $16 million in cash and the assumption of the $22 million balance of existing first mortgages (A. 3a). The petitioner represented to the respondents that he had $16 million and that it was coming from a wealthy British investor, by the name of Freshwater (A. 4a). The respondents believed this representation, and, in reliance thereon, removed the twenty-eight office buildings from the market (A. 36a).

The contract for a purchase price of $38 million was executed in February, 1974 with a closing scheduled for June, 1974. Thereafter, as the district court found:

> In early June of 1974, Rokowsky informed the sellers that he could not raise the $16 million in cash required by the February 12 contract and that the deal would have to be restructured. I find that Rokowsky in fact never intended to pay $16 million in cash, even at the time the contract was executed. His representation to the Gordons that if he could not raise the amount through banks he could get it from Freshwater was a lie. I further find that Rokowsky consistently and continuously lied to the Gordons and subsequently lied to this court concerning his intention to pay $16 million of the purchase price in cash and concerning the availability of cash for that purpose. I find that Rokowsky had intended from the first to wait until the Gordons were firmly committed to the sale, and had incurred considerable expense to consummate it, and then to take advantage of a deteriorating real estate market to renegotiate a deal more favorable to himself and his associates.

Pursuant to his fraudulent scheme, in June, 1974, and frequently thereafter, Rokowsky falsely stated that Freshwater would provide him with $6 million in cash provided that the Gordons took back a purchase money mortgage for the $10 million balance (A. 4a). It should be noted that the respondents had surrendered $4 million at the outset to avoid any purchase money mortgage (A. 4a).

Relying on Rokowsky's statement that he had the $6 million, the respondents agreed to revise the contract by taking back a $10 million purchase money mortgage subject to the release of the deposit which was needed to pay real estate taxes. For this, Rokowsky received a non-negotiable promissory note. Thereafter Rokowsky stated he did not have the $6 million available and requested a further modification of the cash purchase price. The petitioner was never able to close the transaction in any modified form. Later, the Gordons found a new purchaser but at a reduction in the purchase price of $6,468,723 (A. 4a).

Pretrial.

Contrary to petitioner's contention, the pre-trial issues were not limited to a claim of breach of contract to buy real estate. The pre-trial orders clearly raised the question of petitioner's fraudulent inducements of the renegotiated contracts, *i.e.*, Rokowsky's assertion that, although he could not get $16 million from Freshwater, he would have $6 million (A. 51a).

The Trial.

The circuit court's summary of the trial testimony leading to the motion to amend pursuant to Rule 15(b) is as follows:

> No question was raised with respect to the $16 million commitment. However, during trial, Rokowsky himself

constantly asserted it, possibly in connection with his concession that from the start he sought to renegotiate the contract by telling untruths. When this unabashed conduct ultimately induced the court to voice its surprise, counsel responded,

> "It is our position, it is perfectly sound business practice and prevalent in the area from which my client comes to negotiate a contract to the very last moment."

For reasons of his own, Rokowsky contended that this was not inconsistent with the $16 million commitment. In his main brief he stated that the purpose of this profession was an attempt to "harmonize his renegotiation efforts with his contention that he had a commitment from Freshwater by explaining that he felt under a duty to minimize the amount of cash necessary to close the transaction . . . notwithstanding the Freshwater commitment." In this it would appear that he was fleeing from a charge that had never been made.

Rokowsky's admitted practice, amply supported by the evidence, was that once the contract was made, with a small deposit, the buyer, rather than stopping at the contract, continues to negotiate the seller into a corner; cost, nothing, so long as it works; nothing more than the deposit if it does not work, and even then, as this case demonstrates, the buyer may seek to recover the deposit. The reason for this conduct, Rokowsky explained, is that it is always to the buyer's advantage to negotiate down and keep the sellers involved in the properties, viz., as purchase money mortgagees, reducing the agreed cash payment as much as possible.

While Rokowsky's logic, as distinguished from his ethics, may have been sound, we consider it was not unreasonable for the court to combine this admitted con-

> duct with the fact of no semblance or prospect of a commitment to begin with and conclude that there were misrepresentations as to ability and intent to perform, both material matters as constituting fraud in the inducement.
>
> Whatever may have been the purpose of Rokowsky's opening the issue of the contract's initiation and the $16 million commitment, the fact is he did, not incidentally and collaterally, but as a direct and fully litigated matter.

(A. 5a-6a) (footnote omitted).

Rokowsky's injection of the issue and his admission noted above prompted respondents' attorneys to move to amend the pleadings under Rule 15(b) to conform the pleadings to the proof of fraud in the inducement of the original contract which was, by then, already in the case. This was on the sixth day.

The trial court denied the motion at that time without prejudice and stated "at the closing of this case, I won't preclude you from raising it again" (A. 52a).

Notwithstanding petitioner's objection to the allowance of the motion, counsel for both parties continued to interrogate witnesses on Rokowsky's precontract representations, his intent and the respondents' reliance. Petitioner failed to object to such evidence being introduced or to move to strike or limit such evidence (A. 6a, 7a, 32a-36a).

At the conclusion of the trial, respondents reinstated their motion to amend under Rule 15(b). The court heard argument from both sides and notified counsel that it was taking the matter under advisement. Despite petitioner's belated contention below and in his petition to this Court that he was denied an opportunity to be heard, it is clear that the trial judge notified him at the conclusion of the case that:

> I think that the whole area of whether he had the money, and when he had the money, was addressed by you in your principal case.
>
> . . . What would you have discovered that you didn't discover? You have climbed up one side and down the other in every aspect of this case.

(A. 9a, 52a.)
Not only did petitioner's counsel not offer any substantive reply, but he said nothing on the issue for the eleven months between the trial's conclusion and the court's decision (A. 9a).

The District Court's Decision.

In light of the ample evidence of fraud introduced by petitioner concerning his false statements regarding his present intention to pay $16 million in cash and his capacity to raise that sum, the district court permitted the respondents' amendment in order to conform to the evidence under Federal Rules of Civil Procedure 15(b) (A. 28a).

Postjudgment Proceedings.

Following judgment, petitioner's new counsel filed motions for a new trial. The district court found that the issue of fraud in the inducement had been fully tried and recognized as an issue in the case by petitioner's attorney. With respect to petitioner's contention that he was prejudiced because he would have offered additional evidence and conducted additional discovery on the issue of reliance, the district court carefully

considered the proferred evidence and after a careful analysis, found it to be insubstantial (A. 35a-36a).[1]

First Circuit Court's Decision.

The petitioner at pages 7 and 8 contends that the First Circuit in affirming the judgment held that the sole test for determining implied consent was whether evidence was introduced that went only, as distinguished from incidentally, to the new issue, and whether that issue had been fully tried. Petitioner further states that the court declined to consider whether additional evidence might have been offered had the issue been pleaded and that an unpleaded cause of action may be inferred solely on the basis of scraps of evidence gleaned from the record and without regard to whether the opposing party squarely recognized the claim was in issue. These contentions are untrue.

The circuit court's opinion demonstrates that:

a. There was no debatable question presented that fraud in the inducement had been established (A. 3a);

b. Rokowsky opened up and injected the new issue regarding the $16 million commitment into the trial (A. 5a);

c. Rokowsky admitted his fradulent plan and scheme. Indeed, his attorney attempted to defend his conduct as a perfectly sound business practice (A. 5a, 6a);

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[1] It is of interest that petitioner suggests that because the court initially denied the motion to amend, he was somehow precluded from offering evidence which he claims was then in his possession and which would have resulted in dismissal of the fraudulent inducement claim. If there were such evidence requiring dismissal it is beyond belief that petitioner never once mentioned it either at the conclusion of the case when the Rule 15(b) motion was argued fully by both sides, or in the post trial memorandum.

d. Rokowsky's opening the issue was done as a fully litigated matter and not incidentally or collaterally (A. 6a);

e. Having ruled that the petitioner fully litigated an issue raised first by him at trial and, further admitted by him, the court went on to consider additional criteria from which implied consent may also be found, *i.e.*, whether evidence was introduced that went only, as distinguished from incidentally, to the new issue. The court ruled that evidence was introduced which only went to the new issue. Rokowsky failed to object to respondents' inquiry into his intention not to perform the original agreement and respondents' reliance upon his misrepresentation, and he affirmatively elicited testimony on the new issue (A. 7a).

In addition to the district court's extensive treatment of the issue of prejudice and its finding of lack of material prejudice, the circuit court also recognized these issues. The circuit court specifically stated that Rokowsky failed to respond to the district court's inquiry as to what additional evidence he might have introduced, a failure that lasted for eleven months (A. 9a, 52a).

The circuit court further noted that the petitioner did not object at the time Robert Gordon testified that he had relied on Rokowsky's representations. The time to object was then and not now. Of course, as pointed out by the district court, this line of inquiry was pursued by petitioner at the trial (A. 33a, 34a).

Reasons for Denying the Writ.

I. There is No Conflict Between the Circuits Regarding the Standards to be Applied in Allowing a Rule 15(b) Amendment.

In an effort to create a conflict where there is none, the petitioner contends that the First and Fifth Circuits, contrary to other circuits, have adopted a principle that in Rule 15(b) cases, consent can be "divined from snippets of evidence" in the record that may relate to the unpleaded issue alone and from a party's unwitting failure to object to such isolated testimony. The petitioner characterizes this alleged principle as "a rule of inadvertent consent." However, neither the First Circuit nor the Fifth Circuit have adopted such a holding and the suggestion that these circuits apply a rule of inadvertent consent is wholly without foundation.

In order to make this point, petitioner intentionally disregards the fact that the First Circuit found that petitioner had introduced the new issue, admitted his fraudulent scheme and that the new issue was fully litigated.

Moreover, in his disengenious attempt to create conflict, petitioner has cited cases which are distinguishable on their particular facts. Rather than conflict, there is uniformity among the circuits on the factual basis necessary to support a finding under Rule 15(b) that an unpleaded claim was tried by express or implied consent of the parties.

Rule 15(b) Standards.

The circuit courts have constantly relied on the presence of one or more of the following factors:

A. *Injection of the Issue by the Party.*

When the party against whom a Rule 15(b) motion has been allowed has himself injected the new issue, the courts of appeals uniformly uphold the allowance of the motion. The Third Circuit equates injection of the issue by a party with that party's having given implied consent to the trial of that issue. Thus in *Jurinko* v. *Edwin L. Wiegand Company*, 477 F.2d 1038 (3d Cir. 1973), a decision wholly ignored by petitioners, the court at the appellate level amended the pleadings under Rule 15(b), where the defendant during the course of presenting its defense injected the new issue. The Third Circuit said at 1045 n.18:

> We do not think that we are foreclosed from considering this theory of recovery for the issue of discrimination against women as a class was injected into the case by Wiegand *and was therefore* tried below with Wiegand's implied consent. By its own admission and evidence, Wiegand discriminated against women by employing a stereotyped characterization that women were physically unqualified for the jobs the plaintiffs had applied for. See, note 11, *supra*. See F.R.Civ.P. 15(b) and 16. Rule 16 should be read in light of Rule 15(b). See 3 Moore's Federal Practice ¶15.13[1], at 982 and note 11 cited to that text. (Emphasis supplied.)[2]

The Third Circuit was persuaded that implied consent flowed from defendant's having raised the issue in the first instance and having introduced evidence on it.

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[2] *Accord, Hall* v. *National Supply Company*, 270 F.2d 379, 382-383 (5th Cir. 1959); *Lomartira* v. *American Automobile Insurance Co.*, 371 F.2d 550 (2d Cir. 1967).

B. *Admissions During the Trial.*

A party's admitting to illegal or improper conduct on an unpleaded issue mandates an amendment of the pleadings under Rule 15(b). In the case of *J.C. Millett Co.* v. *Distillers Distributing Corp.*, 258 F.2d 139, 144 (9th Cir. 1958), the court stated as follows:

> However, at the trial on a long and pressing examination, one of the Importer's ex-specialty men, who contacted retailers to advertise the Distributor's products, admitted that he was ordered by the Importer to discourage these retailers from placing orders with the Distributor. This evidence is uncontradicted. Such damaging action is a clear breach of paragraph 6 of the contract in which the agent agrees to "promote the sales of its products," a provision necessarily implying an agreement that the agent would not engage in activities hurtful to the Distributor.
>
> The Distributor moved for an amendment of paragraph IX of its complaint to conform to this proof which the court denied. We hold this was error.[3]

When a party injects the new issue into the case and/or admits to improper conduct, all the circuits addressing these facts deem such conduct to be sufficient evidence of implied consent. In *Weigand* and other cases cited above, the circuit courts make no mention of whether the defendant "understood" that the new issue was in the case. Introducing the issue into the case and making admissions are the equivalent of notice and knowledge.

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[3] *See also, T.J. Stevenson & Co., Inc.* v. *81,193 Bags of Flour*, 629 F.2d 338, 370 (5th Cir. 1980).

C. *Where There is No Admission and the Party Against Whom the Motion was Allowed did Not Inject the New Issue, the Circuits Require Sufficient Facts to Demonstrate that the Parties had Reason to Understand or were Fairly Apprised that the New Issue was in the Case.*

The petitioner argues that the First and Fifth Circuits have adopted a principle that consent can be "divined from snippets of evidence" in the record that may relate to the unpleaded issue alone and from a party's unwitting failure to object to such isolated testimony. The petitioner characterizes this as "a rule of inadvertent consent." Unfortunately for petitioner's argument, neither the First Circuit nor the Fifth Circuit have adopted such a holding and the suggestion that these circuits apply a rule of inadvertent consent is wholly without foundation. This thesis is disproven when decisions of the First Circuit and Fifth Circuit are scrutinized in light of the particular facts involved in each decision. An example of this is found in *Jakobsen* v. *Massachusetts Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975), where the First Circuit affirmed the trial court's refusal to allow a new defense by motion after the presentation of evidence because there was insufficient evidence that the parties had reason to understand the new defense was in the case. On that point, the First Circuit said:

> Doubtless, when there is no prejudice and when fairness dictates, the strictures of this rule may be relaxed. Under Rule 15 the district court may and should liberally allow an amendment to the pleadings if prejudice does not result. And if an affirmative defense is actually tried by implied consent, the pleadings may be later made to conform. Fed.R.Civ.P. 15(b). But the defense in question was not tried by implied consent. Some of the evidence received at trial was relevant to it as well as to

other issues — for example, exhibits showing the layout of roads at the terminal and of the spot where plaintiff fell. *But plaintiff had no reason to understand that this issue was in the process of being tried.* Consent cannot possibly be implied under such circumstances.[4] (Emphasis supplied.)

The Fifth Circuit is also clearly in accord with the Third, Sixth and District of Columbia Circuits on similar facts. This is demonstrated in *Bettes* v. *Stonewall Insurance Co.*, 480 F.2d 92, 94 (5th Cir. 1973), and *Kingsley* v. *Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1142 (5th Cir. 1977). These cases establish that, in the absence of introducing the issue or admissions, the First and Fifth Circuits scrutinize the record to ascertain that the issue was litigated and that the parties had reason to understand that the issue was in fact being tried. It cannot fairly be said that there is any conflict between the First, Fifth and the Third or any other circuits. Moreover, whether the parties had reason to understand flows from failing to object to evidence going only to the new issue and from participation by both parties in direct and cross-examination on the new issue.

The Sixth Circuit, in *MBI Motor Company, Inc.* v. *Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974), utilized by petitioner in attempting to fabricate a conflict, cited the Fifth Circuit cases of *Wallin* v. *Fuller*, 476 F.2d 1204, 1210 (5th Cir. 1973) and *Bettes* v. *Stonewall Ins. Company, supra*, for the proposition that a trial court may not base its decision upon an issue that was tried inadvertently. Further, the Sixth Circuit specifically relied upon *Bettes* for the principle that

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[4] *See also, Vargas* v. *McNamara*, 608 F.2d 15, 17, 19 (1st Cir. 1979) and *Keeler* v. *Hewitt*, 697 F.2d 8 (1st Cir. 1982).

implied consent is not established merely because evidence relevant to the unpleaded issue was introduced without objection and that it must appear that the parties had reason to understand the evidence was aimed at the unpleaded issue.

If the Sixth and Fifth Circuits were in conflict such harmony would not be so clearly evident. In fact, there is no conflict.

1. The Circuit and District Courts Did Consider and Correctly Ruled that Petitioner was Not Prejudiced by the Amendment.

The petitioner further contends that the First Circuit gives no consideration to whether a party could have offered additional probative evidence. In essence, petitioner appears to be contending that the First Circuit ignores the issue of prejudice when reviewing a Rule 15(b) case.

This contention is completely false. The First Circuit rulings in *Jakobsen*, *supra*, *Vargas*, *supra*, *Keeler*, *supra*, and the case at bar demonstrate conclusively that lack of undue prejudice is a necessary requirement for the allowance of a Rule 15(b) motion.

Moreover, the district court in the case at bar made an extensive inquiry into the issue of prejudice, *i.e.*, whether the petitioner had additional evidence it could have introduced on the new issue. The court found petitioner's assertion of prejudice to be insubstantial (A. 35a-37a). Contrary to petitioner's assertion that the First Circuit ignores whether a party could have introduced additional evidence, the First Circuit in the case at bar did consider that factor and ruled that Rokowsky had failed to cite any additional evidence either when directly asked by the trial court at case end or in post-trial memoranda (A. 9a, 52a).

2. The Cases Cited by the Petitioner are Distinguishable on their Facts and do Not Support his Contention that there is a Conflict Among the Circuits.

The cases relied on by petitioner in an effort to create a conflict have absolutely no factual similarity with the case at bar or the Fifth Circuit cases selected by him for comparison.

For example, in *MBI Motors, supra,* the court found that the testimony that was adduced and relied upon by the plaintiff was relevant also to the pleaded issue, that the parties in direct and cross-examination of witnesses concentrated only on the pleaded issues and that such conduct along with the statements made by counsel to the court during the trial persuaded the Sixth Circuit that neither the plaintiff nor the defendant believed that they were trying the new issue.

Similarly, the Third Circuit's decision in *Schultz* v. *Cally,* 528 F.2d 470 (3d Cir. 1975), is not in collision with the First Circuit's ruling in this case.

In *Cally,* the parties tried a state common law claim. There was in fact no diversity of citizenship and substantive facts necessary to support federal question jurisdiction were neither pleaded nor tried. On an incomplete record the circuit court remanded the case for further hearings on the question of the existence of federal jurisdiction and the propriety of exercising pendant jurisdiction. There was simply no adequate basis on this limited record for the appeals court to make a determination under Rule 15(b). *Cally,* therefore, is in marked contrast to the case at bar.

Moreover, it is apparent that on similar facts the First Circuit would have reached the same result as the Third Circuit in *Cally.* Compare *Jakobsen* v. *Massachusetts Port Authority, supra* at 12. Also compare *Cally* with *Niedland* v. *United States,* 338 F.2d 254, 258 (3d Cir. 1964) cited by *Cally.* In *Neidland* the court found that the unpleaded issue had been

litigated. It did so because "the defendant not only stood silently by when the evidence was offered on behalf of the plaintiff, but also vigorously defended on this issue." *Id.* at 259.

Similarly, plaintiff's reliance on *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 478 & n.370 (D.C. Cir. 1976), is misplaced. In a five-week trial, the party against whom the Rule 15(b) motion was sought had only appeared in court on two occasions and had not even introduced evidence. Moreover, the plaintiff had been joined as a nominal party originally and the record was devoid of any facts which could have placed that defendant on notice that a new issue was in the case. On that factual basis, the District of Columbia Circuit found that there was absolutely no basis for allowing a Rule 15(b) motion.

It is misleading in the extreme for petitioner to have selectively culled cases having absolutely no factual similarity with the facts before the First Circuit in the case at bar. It is manifestly clear that the First and Fifth Circuits would, and have, reached the same results on similar facts.

3. Merely Opposing a Rule 15(b) Motion when Presented will Not Preclude Trial by Implied Consent when the New Issue was Fully Litigated Prior to and After Opposition to the Motion.

Prior to the filing of the Rule 15(b) motion on the sixth day of trial, the petitioner had injected the new issue, had admitted his fraudulent scheme and practice, had failed to object to respondents' inquiry as to his intention not to perform and, indeed, actually *elicited* affirmative testimony to the effect that the respondents relied on the so-called Freshwater commitment (A. 5a-7a). When the motion to add the issue of fraud in the inducement of the original contract was made, the court, in denying it without prejudice, stated "at the close

of this case, I won't preclude you from raising it again." (A. 52a.)

Thereafter, the petitioner failed to object, and, indeed participated in interrogation of witnesses on the new issue (A. 7a, 33a-35a, 36a). In reply to petitioner's argument below that the mere fact of their opposition to the motion to amend precluded the allowance of a 15(b) motion, the First Circuit said:

> Whatever may have been the purpose of Rokowsky's opening the issue of the contract's initiation and the $16 million commitment, the fact is he did, not incidentally and collaterally, *but as a direct and fully litigated matter.* The fact that he objected to the amendment to conform with what it led to did not mean that implied consent could not be found from his conduct. *See, e.g., Dunn* v. *TWA, Inc.*, 9 Cir., 1978, 589 F.2d 408, 412-13; *deHaas* v. *Empire Petroleum Co.*, 10 Cir. 1970, 435 F.2d 1223, 1228-29; *Cohen Sons & Co.* v. *Koch*, 1 Cir., 1967, 376 F.2d 529, 632-33. (A. 6a-7a) (emphasis supplied) (footnote omitted).

From the above language, it is clear that the court does not "stand the meaning of consent on its head" as petitioner argues. Rather, it is the petitioner who is confusing the issue and intentionally misinterpreting the meaning of implied consent.

In the face of a litigant's having injected the new issue, having admitted an intent to defraud, failing to object to evidence bearing only upon the new issue and himself participating in direct and cross-examination on the unpleaded issue, the simple act of opposing the motion can never be deemed to relieve petitioner from the consequences of his conduct prior to and after the motion to amend was raised. To hold otherwise would render Rule 15(b) a nullity.

In accord with this manifestly proper view of Rule 15(b) are not only the cases cited by the First Circuit from the Ninth Circuit and Tenth Circuit, but also *Niedland* v. *United States, supra*, and *T.J. Stevenson and Co., Inc.* v. *81,193 Bags of Flour, supra* at 629 F.2d 370, the Third and Fifth Circuits respectively.

The petitioner has intentionally confused this issue by citing cases in which parties have consistently objected to introduction of evidence on the new issue, thus negating any implied consent. In the case at bar, as the district court and the circuit court have found, there was full participation in the actual trial of the new issue throughout the case. Petitioner can cite no case in which a party, having fully litigated the new issue, has defeated the application of Rule 15(b) by the simple expedient of subsequently objecting to the allowance of the motion to conform to the proof already in the case.

Petitioner's reliance on *Nerenhausen* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 479 F. Supp. 750 (D. Minn. 1979) is wholly misplaced and underscores their desperate attempt to create conflict where there is none. *Nerenhausen* was an employee suit against the railroad under the Federal Employers Liability Act. Because the injury involved equipment manufactured by Westinghouse, the railroad impleaded Westinghouse as a third-party defendant. Not until after opening arguments did the plaintiff seek to move in accordance with Rule 15(a) to join Westinghouse as a direct party defendant. That motion was denied and the trial went forward with Westinghouse relying on the fact that its only potential liability was to the third-party plaintiff as an indemnitor. After the jury rendered a verdict in the amount of $150,000 to the plaintiff and in the amount of $75,000 against Westinghouse as an indemnitor, plaintiff moved under Rule 15(b) to seek a claim directly against Westinghouse. That motion was properly denied by the district court and we believe it is obvious that those circumstances have absolutely no bearing

upon the case at bar. The entire trial proceeded on the basis that Westinghouse need only defend on the third-party action.

The remaining district court cases cited are of no assistance to petitioner. They all contain factual situations wherein the opposing party immediately objected to any evidence relating to the new issue, thus negating any potential finding of implied consent. In *Keeler* v. *Hewitt, supra*, the First Circuit demonstrates that it is in accord with all of the cases cited by petitioner. There, the First Circuit did not find implied consent when the defendant repeatedly objected to the introduction of any evidence bearing upon the new issue.

The suggestion that the First Circuit ruling in all the circumstances of this case "is a summons to trickery by litigants in search of a winning theory" is an unfounded affront to that court, especially where petitioner blatently introduced evidence at the trial which showed that he had consistently and continuously lied to the respondents and subsequently lied to the district court concerning his intention to pay $16 million of the purchase price in cash and concerning the availability of cash for that purpose (A. 16a). To contend, as petitioner does, that he should be relieved of the consequences of his admitted fraud and scheme because he subsequently objected to the allowance of a Rule 15(b) motion designed to conform the pleadings to the evidence of his fraud is ludicrous and deserves no judicial consideration whatsoever.

II. Petitioner was Not Deprived of his Seventh Amendment Right to Trial by Jury.

In setting the tone for his Seventh Amendment argument, petitioner does not proceed from the facts in this case. Rather, deliberately ignoring them, he postulates at page 16 of his petition that the district and circuit courts ruled that a party's fail-

ure to object to evidence that later turned out to bear upon an unpleaded cause of action was *alone* sufficient to constitute a waiver of the Seventh Amendment and that that ruling placed the First Circuit in conflict with other circuits.

The petitioner again deliberately ignores the findings and rulings of the district court and the First Circuit that he injected the new issue, admitted his fraudulent scheme, failed to object to evidence on the new issue and in fact vigorously participated in both direct and cross examination on the new issue. It is so plain from a simple reading of both the district court's and circuit court's opinions that one wonders why petitioner insists on trying to force this case into a set of facts which are not in accordance with reality. The case before the First Circuit was one in which a litigant at the outset waived a trial by jury on a contract claim and an issue of fraud in the inducement of the renegotiated contract. In that context, he blatently admitted that he committed fraud in the inducement of the original contract. That admission further led to direct and cross-examination on every aspect of the new fraud issue both before and after respondents made their motion under Rule 15(b).

The petitioner did not raise the question of a jury trial when the judge said he would permit the Rule 15(b) motion to be raised again at the end of the case. The petitioner did not raise the issue of a jury trial when, at the close of the case, the trial judge heard argument on the Rule 15(b) motion and advised counsel that he was taking the matter under advisement. Moreover, the petitioner never raised the question of a jury trial in his post-trial memorandum. In short, the First Circuit's ruling that "this is not a case where the amendment called for a further trial" and hence there was no deprivation of a jury trial, is fully in accord with the authorities.

The 6th Circuit's opinion in *Arber* v. *Essex Wire Corporation*, 490 F.2d 414, 423-424 (6th Cir. 1974) is squarely in point

on this question. After the close of the evidence in that case, the court indicated to the parties that the federal cause of action was still open, that he had heard evidence on the matter, and that the parties should submit briefs addressing the merits of the federal cause of action because, in his final judgment, he would consider whether to reinstate the federal action or limit the case to the state claim. In affirming the trial court, the circuit court stated that by so advising the parties, trial court was not obligated to impanel a jury when it decided to reinstate the federal claim after the case had been tried.

In reaching its conclusion, the Sixth Circuit held:

> When new legal issues arise during the course of a non-jury trial, they can certainly be determined by the court with the express or implied consent of the parties. Scholl v. Scholl, 80 U.S.App.D.C. 292, 152 F.2d 672 (1945); Fidelity and Deposit Co. v. Krout, 157 F.2d 912 (2d Cir. 1946); Smith v. Cushman Motor Works Co., 178 F.2d 953 (8th Cir. 1950). *See generally*, 5 Moore's Federal Practice § 38.41, 329 (1971). Here appellants' counsel not only failed to suggest to the court that the revived federal claims raised new legal issues, but also appears to have agreed to trial by the judge alone of all issues on the 10b-5 claim.

Id. at 423.

In 5 Moore's Federal Practice, ¶38.41 (2d ed. 1982) at 38-371, the following comment and analysis is made:

> If the new issue, although not raised by the pleadings, is legal, but is tried to the court by the express or implied

> consent of the parties and without any demand for jury trial having been made at the time the new issue was injected into the case, any right of jury trial has been waived and a party may not thereafter properly contend that he was denied his constitutional right of a jury trial. (Footnote omitted.)

It is critical in the consideration of this issue to distinguish between an amendment to conform pleadings to the evidence already introduced, and an amendment to permit the proponent to thereafter introduce evidence on a new factual issue. The express or implied consent which permits an amendment, subsequent to trial, to conform to the evidence is also held to bar the defendant from subsequently demanding a jury trial on those same issues. 5 Moore's Federal Practice, *supra*.

It is difficult to conceive of a more apparent waiver of a jury claim in a Rule 15(b) context than in the case at bar. Rokowsky was on notice that his fraudulent conduct was an issue in the case, and, having waived a jury, opened the door on his plan to defraud the Gordons by his own admissions.

As with the prior issues, petitioner seeks certiorari by citing cases which on their facts have no applicability to the case at bar.

The suggestion by petitioner that the First Circuit in this case ignores basic Seventh Amendment teachings is unfounded. Their own cases support the First Circuit's decision.

Thus, for example, in *Bowles* v. *Bennett*, 629 F.2d 1092 (5th Cir. 1980) the Fifth Circuit acknowledges that a jury trial can indeed be waived by implication. In the particular facts of that case, a trial judge tried to convince counsel to participate in a combined hearing on an injunction and a trial on the merits. Counsel continually refused to do so and after a lengthy dialogue, flatly informed the court that he was not in a

position to agree to combining the hearing on the injunction with a final submission. Notwithstanding this clear refusal to a trial on the merits, the court rendered a final judgment. Under these circumstances, the rule in *Bowles* has no applicability to this case.

In *Heyman* v. *Klein*, 456 F.2d 123 (2d Cir. 1972) a trial judge intent upon expediting a jury-waived trial, on motion, struck the defendant's demand for jury which had been timely filed as part of the defendant's answer. At a time when his answer was not yet due to be filed, defendant's counsel stood silent when the trial judge said that he would try the case without a jury. However, in his answer, the defendant timely claimed a jury. The Second Circuit held that under these circumstances, waiver prior to the time for demanding jury trial must be based upon nothing less than an affirmative representation that the client has determined not to claim a jury trial. The particular facts in *Heyman* have no bearing on the case at bar and the principles enunciated therein do not apply to the facts in this case.

Similarly inapposite is petitioner's contention that the case of *Johnson* v. *Harrah's Club*, 30 F. R. Serv. 2d 1153, 1154 (9th Cir. 1980) is squarely in conflict with the First Circuit's decision. There is absolutely no conflict between these two decisions.

In that case,[5] the 9th Circuit found it was an abuse of discretion for the district court to have allowed the amendment of the complaint because it found the issue had not been tried by express or implied consent of the parties. The Court said at 1153: "In the instant case, A Title VII action was tried. The breach of employment contract issue was only inferentially suggested by the evidence adduced by the parties. It was an abuse of discretion to allow amendment of the complaint."

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[5] By local rule, the *Johnson* decision may not be cited as precedent in the Ninth Circuit.

Accordingly, when the court ruled that the party had not impliedly consented to the trial of the new issue, *a fortiori* the party had not expressly or impliedly waived a jury trial on that issue.

When a litigant during a non-jury trial introduces a new issue, fully litigates that issue, makes admissions regarding it, and fails to demand a jury trial despite numerous opportunities to do so, he has waived his right to a jury trial. It is just this set of facts that the First Circuit dealt with.

III. The Petitioner was Not Deprived of Due Process by the Allowance of the Amendment After Trial.

Petitioner claims that the First Circuit's decision deprived him of the right to due process of law. As with the other issues raised in his petition, the facts are simply misstated and the court's decision distorted.

Despite the clear showing in both the district court's and circuit court's opinions that this is a case in which petitioner first injected the issue, made admissions concerning his fraud in the inducement and fully litigated the matter, petitioner insists that the only notice he received at trial were "two scraps of evidence which he reasonably believed related to claims already in issue." That contention is an absolute misstatement of fact.[6] Petitioner was put on notice in the pre-trial state-

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[6] The petition for certiorari is not the first time that petitioner has taken the opportunity to misstate the facts in the case. His previous attempt prompted the First Circuit to comment:

> "(1) Petitioner alleged in that petition, . . . the only claims asserted against Mr. Rokowsky were for breach of contracts to buy real estate.

This is a flat misstatement; the Gordons also alleged, at the start, fraud in the inducement of the renegotiated contracts (Rokowsky's asserted access to $6 million)." (A. 5a).

ment that the respondents were claiming fraud in the inducement of the non-negotiable promissory note and renegotiated contracts in July, 1974.

At the trial he injected the issue of fraudulent inducement of the original contract and made admissions which disclosed that his fraudulent scheme had commenced prior to the execution of the original contract. It is of extreme importance that petitioner's counsel did not attempt to retreat from the admission but rather brazenly told the court that it was petitioner's standard practice, that after executing a contract promising to pay cash, he negotiated the cash price down by telling untruths to the sellers (A. 5a). If this were not notice enough, when the motion to add the issue of fraud with respect to the original contract as well as the renegotiated contracts was made mid-trial to conform the pleadings to the proof, the court, in denying the motion without prejudice stated "at the closing of this case I won't preclude you from raising it again." (A. 52a.)

As the First Circuit stated, "surely, this was full warning." (A. 52a.)

Moreover, petitioner's assertion that he possessed evidence which he did not introduce and which would have led to a dismissal of the respondent's claim, is without basis in the record. Neither at the close of the trial, when queried by the district court, nor in the post-trial memorandum did the petitioner suggest any additional probative evidence that he would have introduced on the new issue (A. 52a). In ruling on the petitioner's motion for a new trial based upon the alleged contention that he had additional evidence that was not introduced, the district court found his assertion of prejudice to be insubstantial and no basis for denying the motion to amend or for granting a new trial on the issue.

The petitioner utterly failed to demonstrate any prejudice at all, let alone any undue or material prejudice required by the decisions of the various circuit courts on Rule 15(b) motions.

T.J. Stevenson & Co., Inc. v. *81,193 Bags of Flour*, *supra*; *deHaas* v. *Empire Petroleum Co.*, *supra*; *Mineral Industries & Heavy Construction Group, Brown & Root, Inc.* v. *Occupational Safety and Health Review Commission*, 639 F.2d 1280, 1294 (5th Cir. 1981); *Northern Oil Company* v. *Socony Mobil Oil Company*, 347 F.2d 81 (2d Cir. 1965); *Jurinko* v. *Edwin L. Wiegand Co.*, *supra*.

At the conclusion of the case, the trial court told petitioner that it wanted full argument on the Rule 15(b) motion. After full argument by both sides, it informed counsel that it was taking the motion under advisement and would decide it as a part of the final decision. At that time petitioner should have informed the court that he had additional evidence not yet adduced, or that a continuance was necessary for such purpose. *See*, *Northern Oil Company* v. *Socony Mobil Oil Company*, *supra* at 83, 84.

It is too late for petitioner to say he was precluded from raising additional evidence because he did not know that the court would change its mind and allow the amendment. The fallacy of this argument lies in petitioner's attempt to make it appear that the court changed its mind. It is apparent from the record that the court never changed its mind. The denial without prejudice and with the clear warning that the matter would be reconsidered at the conclusion of the trial placed everyone present on notice. Petitioner's contention of deprivation of due process because of lack of notice is absurd when he opened the issue, admitted the fraud and fully litigated that issue and utterly failed to demonstrate any prejudice.

Conclusion.

Based upon the pleadings and the pre-trial statement, petitioner was on notice that he would have to prepare for and

meet at trial a claim that he had made fraudulent misrepresentations of fact which induced respondents to renegotiate the original contract and deliver a non-negotiable note in the amount of $640,000. During his direct testimony, petitioner constantly referred to his admitted practice of making a contract with a small deposit with the intention of ultimately renegotiating that contract by telling lies to the seller in an effort to cause the seller to reduce the cash purchase price and take back a purchase money mortgage.

After the trial court gave notice that respondents' motion to amend could be raised at the conclusion of the case, petitioner continued by direct and cross-examination to litigate the new issue. The trial court gave petitioner every opportunity to articulate substantive objections to his considering as an issue in the case the question of fraud in the inducement which petitioner had fully tried. He failed to so do.

On these facts, there is unanimity among the courts of appeals and not one would have reversed the trial judge's findings that the new issue was tried by the implied consent of the parties. Furthermore, there is no conflict among the circuit courts on any aspect of the judicial administration of Rule 15(b). Rather, all of the decisions relied upon by petitioner can be clearly distinguished on their particular facts.

Where petitioner's trial of the new issue resulted from his injection of that issue and admissions of his fraudulent conduct the First Circuit did not err in deeming that conduct to be a clear waiver of a right to trial by jury. Petitioner was hardly a victim of "federal rules invoked . . . in derogation of constitutional norms." If he were a victim at all, it was from self-inflicted wounds.

We respectfully submit there is no basis upon which to grant certiorari in this case and we ask the court to deny the petition.

Respectfully submitted,

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